INTERSTATE COMMERCE IN INTOXICATING LIQUORS BEFORE THE WEBB-KENYON ACT.*

II. The Adoption of the Wilson Act.

THE practical nullification of state laws by these successive decisions of the Supreme Court of the United States did not go unchallenged in quarters other than Congress, where the attempt was immediately made to secure national legislative assistance. Beyond the fact that the two most recent and most damaging decisions [1] were a serious set back to the prohibition movement, they had some political importance in that they threatened to injure the Republican party in whose ranks most of the prohibitionists were to be found.[2] Further consideration of the criticism of the cases on legal grounds will be deferred until the discussion of the constitutionality of the Wilson Act, but it is proper here to call attention to the decisions affecting another article in interstate commerce to arrive at which the Court apparently had some difficulty. I refer to the legislation passed by the states to limit the manufacture and sale of oleomargarine, there thus arising, as was the case with intoxicating liquors, questions as to the right of the importer to sell in the original packages.

There was, in the first case decided,[3] no question as to inter-

*Editorial Note: The first part of this article appeared in the December, 1916, issue of the Virginia Law Review, p. 174.

[1] Bowman *v.* Chicago, 125 U. S. 465 (1888); Leisy *v.* Hardin, 135 U. S. 100 (1890).

[2] A. A. Bruce, "The Wilson Act and the Constitution," 21 Green Bag 211 (1909).

[3] Powell *v.* Pennsylvania, 127 U. S. 678 (1888). See also, In re Brosnahan, 18 Fed. 62 (1883). The New York Court of Appeals held, in a unanimous decision, that an act (1884) prohibiting the manufacture or sale, as an article of food, of substitutes for butter was unconstitutional, on the ground that the prohibition was not limited to unwholesome or simulated products, but applied to all manufactured substitutes which might be healthy and openly avowed. People *v.* Marx, 99 N. Y. 377 (1885). This case was cited with approval by Mr. Justice Field in his dissent referred to below. But see People *v.* Arensberg, 105 N. Y. 123 (1889), *infra*.

state commerce. A Pennsylvania statute forbade the manufacture, sale, or possession for sale of imitation butter. This policy, said the Supreme Court, had evidently been determined upon by the Pennsylvania legislature, "upon the fullest investigation" in order to "promote the public health, and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government." [4] The next state law that was passed upon, however, applied to importations. The Massachusetts regulation forbade the sale of the substance when artificially colored to resemble butter, the statute being entitled, "An act to prevent deception in the manufacture and sale of imitation butter." The acts which the Pennsylvania statute considered by the Supreme Court of the United States in the Powell case sought to punish occurred before the Congressional statute of August 2, 1886 [5]—secured by the dairy interests—laying special taxes upon the manufacture and sale of oleomargarine, and before considering the question of the relation of the Massachusetts law to the commerce clause, Mr. Justice Harlan, who delivered the opinion in

[4] At p. 686. Mr. Justice Harlan added that, "If the incompatibility of the Constitution and the statute is clear or palpable, the courts must give effect to the former. And such would be the duty of the court if the state legislature, under the pretence of guarding the public health, the public morals, or the public safety, should invade the rights of life, liberty, or property, or other rights, secured by the supreme law of the land." The fact that it is possible to abuse a particular legislative power does not disprove its existence. "That possibility exists even in reference to powers that are conceded to exist."

Mr. Justice Field dissented, thinking the state law unconstitutional. He had no doubt of the power of the state to regulate the sale, when the regulation did not in effect destroy property rights; but Mr. Justice Harlan's opinion ignored the distinction between regulation and prohibition (p. 699). See Fields' opinion in Bartemeyer *v.* Iowa, 18 Wall. 129, 137 (1873).

[5] 24 Stat. L. 209; United States *v.* Eaton, 144 U. S. 677 (1892). On the general subject of legislation secured by the dairy interests, see WIEST, THE BUTTER INDUSTRY IN THE UNITED STATES (COLUMBIA UNIVERSITY STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW, vol. LXIX, No. 2, 1916).

this case also,[6] disposed of the contention "that Congress intended in that enactment to interfere with the exercise by the States of any authority they could rightfully exercise over the sale within their respective limits of the article defined as oleomargarine." [7] The act of August 2, 1886, made applicable to the taxes it imposed the sections of the Revised Statutes (relating to the liquor taxes) which provided that the federal revenue provisions should not exempt the subjects from taxation by the states or authorize businesses contrary to local laws.[8] Nor could this act be regarded as a regulation of commerce and a declaration by Congress that commerce in these particular articles should be unrestricted by state interference.

In considering the effect of the commerce clause,[9] Mr. Justice Harlan reviewed a number of previous decisions and showed that they contained no principle which would make the Massachusetts regulation invalid.[10] As to Leisy *v.* Hardin [11] the matter was not so simple. It is sufficient to say of that case, said the opinion,[12] "that it did not in form or in substance present the particular question now under consideration. The article which the majority of the court in that case held could be sold in Iowa in original packages, the statute of that State to the contrary notwithstanding, was beer manufactured in Illinois and shipped to the former State to be there sold in such packages. So far as the record disclosed, and so far as the contentions of the parties were concerned, the article there in question was what it appeared to be, namely, genuine beer, and not a liquid or drink colored

[6] Plumley *v.* Massachusetts, 155 U. S. 461 (1894).

[7] *Ibid*, p. 466.

[8] §§ 3232-3241, 3243.

[9] Pp. 468-473.

[10] Railroad *v.* Husen, 95 U. S. 465 (1877) *supra*, p. 190; Minnesota *v.* Barber, 136 U. S. 313 (1890), declaring invalid a statute which discriminated against healthy meat taken from animals slaughtered in other states; Brimmer *v.* Rebman, 138 U. S. 78 (1891), declaring invalid a Virginia statute which prohibited the sale of wholesale meat if from animals slaughtered over one hundred miles from the place of sale; Voight *v.* Wright, 141 U. S. 62 (1891), declaring invalid a Virginia law which provided for the inspection of flour brought into the state when the same requirement was not made as to flour locally manufactured; Walling *v.* Michigan, 116 U. S. 446 (1886), *supra*, p. 187, n. 38.

[11] 135 U. S. 100 (1890), *supra*, pp. 192-194.

[12] P. 474.

artificially so as to cause it to look like beer. * * * Leisy *v.* Hardin must be restrained in its application to the case actually presented for determination, and does not justify the broad contention that a State is powerless to prevent the sale of articles manufactured in or brought from another State, and subjects of traffic and commerce, if their sale may cheat the people into purchasing something they do not intend to buy and which is wholly different from what its condition and appearance import." The opinon then referred to the decision [13] sustaining the Wilson Act and quoted it as declaring that the "power to make the ordinary regulations of police remains with the individual States, and can not be assumed by the National Government."[14]

Speaking for the Court, Mr. Justice Harlan went on to declare himself unable to accept the view that if the owners of a compound made it so as to cheat the public into believing that it was a particular article of food, the sale was not protected by the Constitution because of the fact that the packages may be the original ones. He said: [15]

> "We are of opinion that it is within the power of a State to exclude from its markets any compound manufactured in another State, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy. The Constitution of the United States does not secure to anyone the privilege of defrauding the public. The deception against which the statute of Massachusetts is aimed is an offence against so-

[13] In re Rahrer, 140 U. S. 545, 546 (1891).

[14] Mr. Justice Harlan referred to a number of state cases which he said supported his views. People *v.* Arensberg, *supra,* declining to apply the principle of People *v.* Marx, *supra,* to a statute directed against oleomargarine falsely colored; McAllister *v.* State, 72 Md. 390 (1890); State *v.* Newton, 50 N. J. L. 534, 14 Atl. 604 (1888); State *v.* Marshall, 64 N. H. 549, 15 Atl. 210 (1888); State *v.* Addington, 77 Mo. 110 (1882); Powell *v.* Commonwealth, 114 Pa. St. 265, 7 Atl. 913 (1887); Butler *v.* Chambers, 36 Minn. 69, 30 N. W. 308 (1886); Weideman *v.* State, 55 Minn. 183, 56 N. W. 688 (1893). But it should be remarked that these cases were little authority on the question of the relation between the state statutes and the commerce clause.

[15] Pp. 478-479.

> ciety; and the States are as competent to protect their people against such offences or wrongs as they are to protect them against crimes or wrongs of more serious character. And this protection may be given without violating any right secured by the national Constitution, and without infringing the authority of the general government. A State enactment forbidding the sale of deceitful imitations of articles of food in general use among the people does not abridge any privilege secured to citizens of the United States, nor, in any just sense, interfere with the freedom of commerce among the several States."

Mr. Chief Justice Fuller (with whom concurred Mr. Justice Field and Mr. Justice Brewer) dissented in a short opinion. He said that commerce must be uniform so long as Congress does not regulate it or permit the states to do so, and denied, "that a State may exclude from commerce legitimate subjects of commercial dealings because of the possibility that their appearance may deceive purchasers in regard to their qualities." He added that, "Fluctation in decision in respect of so vital a power as that to regulate commerce among the several States, is to be deprecated, and the opinion and judgment in this case seem to me clearly inconsistent with settled principles." [16]

This is quite true, for the decision is more nearly in harmony with Mr. Justice Harlan's dissents in the Bowman and Leisy cases than it is with the majority opinions, and the fact that falsely colored oleomargarine may defraud the purchaser, does not seem to me a sufficient ground for not applying the same rule—even though incorrectly announced—as to intoxicating liquors. As has been well said, "the consequences of buying, even through error, a palatable and nutritious substitute for butter, instead of the genuine article, are not worse than the consequences of disease and crime which result from the general use of intoxicating liquors." [17]

In the next case,[18] however, the Supreme Court carefully restricted the scope of Plumley *v.* Massachusetts. The Pennsylvania law which had first been considered was again in issue;

[16] Pp. 481, 482.

[17] PRENTICE AND EGAN, THE COMMERCE CLAUSE, p. 51.

[18] Schollenberger *v.* Pennsylvania, 171 U. S. 1 (1898).

but the packages sold were the ones originally imported, and the fact that the article was not butter was made known to the purchaser. So far as manufacture and intra-state sales were concerned, the statute had already been declared valid [19] and the Court said: [20]

> "There is nothing whatever inconsistent with that opinion in holding, as we do here, that oleomargarine is a legitimate subject of commerce among the States, and that no State has a right to totally prohibit its introduction in its pure condition from without the State under any exercise of its police power. The legislature of the State has the power in many cases to determine as a matter of state policy whether to permit the manufacture and sale of articles within the State or to entirely forbid such manufacture and sale, so long as the legislation is confined to the manufacture and sale within the State. * * * but the legislative policy does not extend so far as to embrace the right to absolutely prohibit the introduction within the limits of the State of an article like oleomargarine, properly and honestly manufactured."

Nor was there any inconsistency between such a conclusion and that arrived at in the Massachusetts case,[21] for the statute there applied only to substances manufactured *in imitation* of butter; and the element of fraud had been the decisive factor. The same rule was now applied, therefore, to imported packages of oleomargarine as had been applied to imported packages of liquor, with the single exception of ones fraudulently marked.[22] Here also Congress was importuned to pass remedial legislation, and the Act of May 9, 1902, declared that oleomargarine transported into any state should "upon the arrival within the limits of such state" be subject to the laws of the local jurisdiction as if manufactured therein. And here also the problem was solved

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[19] Powell *v.* Pennsylvania, *supra.* [20] At pp. 16, 17.

[21] Plumley *v.* Massachusetts, *supra.*

[22] Mr. Justice Gray and Mr. Justice Harlan dissented (the former writing the opinion) on the ground that the state law was valid as applied to packages imported into Pennsylvania irrespective of false markings or colorings. (p. 25).

As to the power of a state to require the marking of packages containing oleomargarine manufactured within its limits, see Capitol City Dairy Co. *v.* Ohio, 183 U. S 238 (1902).

in a manner analogous to that of intoxicants in interstate commerce, for the language of the statute [23] almost exactly parallels that of the Wilson Act—the sole difference in phraseology being dictated, doubtless, by the interpretation which the courts had given the earlier measure which will now be considered.

It was Iowa legislation that the Supreme Court of the United States declared inoperative in Bowman *v.* Ry. Co. and Leisy *v.* Hardin, so it was natural that Senator Wilson of that State should father the measure which Congress was soon to pass as an attempt to settle the conflict of jurisdiction. Action had been asked by him as early as 1888, immediately after the Bowman case, and before he could get his bill considered the subsequent decision, far more fatal to state enforcement, made a revision of the measure necessary, and it was not until August, 1890, that a law was finally passed. Some slight consideration must be given to the legislative history of the Wilson Act, for this explains, I think, its real purpose and lets one more easily see the casuistry of the positions subsequently taken by the Supreme Court of the United States.

The first bill was introduced by Senator Wilson at the second session of the Fiftieth Congress. It proposed that the consent of Congress be given "that the laws of the several States relating to the sale of distilled and fermented liquors within the limits of each State, may apply to such liquors when they have been imported, in the same manner as when they have been manufactured in the United States," [24] and the passage of the measure was asked on the ground that it seemed "to be the only practicable way now presented for surmounting the judicial obstacles that have been interposed to the efficient enforcement of the reserve police powers of the states." [25] The "judicial obstacle" was the Bowman case, but if Congress had acted favorably the difficulty would hardly have been obviated, since the bill applied only to foreign importations and did not touch the question of interstate commerce.

That the proposed legislation was both unconstitutional and

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[23] 32 Stat. L. 193.

[24] S. 1067; CONGRESSIONAL RECORD, 50th Congress, 2d session, p. 1882.

[25] *Ibid.*, p. 1888.

improper was the gist of the unfavorable report that was made by the Senate Committee.[26] But a minority of the committee recommended a substitute more nearly conforming to the precedent contained in the internal revenue law, and declared that its constitutionality was established by analogy to the provision [27] which permitted the states to impose taxes on the shares of national banks, although such a state measure had been declared unconstitutional by the United States Supreme Court in McCulloch *v.* Maryland.[28] The minority amendment declared that the payment of a federal import tax on intoxicating liquors should not be held to exempt any person or the property itself from the operation of state laws equally applicable to all property of the same nature "respecting the manufacture, sale, furnishing, or possession of such liquids or liquors." [29] But even as amended the bill failed of passage, and it was not until the next Congress—with the decision of Leisy *v.* Hardin marking the interim —that action was secured.

The bill which formed the basis of the Wilson Act was introduced in the Senate on December 4, 1889 [30] by Senator Wilson, was reported back with amendments from the Committee on the Judiciary on May 14, 1890, amended in the Senate on May

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[26] 50th Congress, 1st session, Senate Report 610. The report was made from the Committee on the Judiciary when only the Bowman case had been decided, Senator George arguing that "Congress can not return to the states a power given to the Constitution by Congress; much more can not Congress delegate or surrender a granted power to any portion of the states, for that would *pro tanto* invest those states with powers not possessed by the others. We may safely rest, therefore, on the conclusion that this bill is unconstitutional in submitting the foreign commerce named in it to regulation by state laws, unless we shall find that Congress may, without any aid from state laws, make different regulations as to importations in different states," and this proposition was impossible, since the Constitution provides for uniform taxes and prevents preference to the ports of one state. (P. 3.) But after Leisy *v.* Hardin and the *dicta* referring to Congressional permission, Senator George favored a remedial measure and accepted the method suggested by the Supreme Court, although still believing in the incorrectness of the decisions. See *infra.*

[27] Rev. Stat., § 5219.

[28] 4 Wheat. 316 (1819).

[29] Senate Report 610, p. 7.

[30] S. 398; CONGRESSIONAL RECORD, 51st Congress, 1st Session, p. 104.

29th, and finally passed, in the meantime being exhaustively debated. As amended by the Senate Committee [31] the bill would have enacted:

> "That no State shall be held to be limited or restrained in its power to prohibit, regulate, control, or tax the sale, keeping for sale, or transportation as an article of commerce or otherwise, to be delivered within its own limits, of any fermented, distilled, or other intoxicating liquids or liquors by reason of the fact that the same have been imported into such State from beyond its limits, whether there shall or shall not have been paid thereon any tax, duty, import, or excise to the United States."

The report of the Commitee favoring the measure was a brief document which referred to Leisy *v.* Hardin and considered as an invitation to legislative action the statement of the Supreme Court "*that in the absence of Congressional permission to do so,*" the state has no power to prevent importation and sale in the original package. Senator George pointed out that in a report made to the Senate at the previous session of Congress, the opinion had been expressed that a measure like that proposed was unconstitutional. The majority thought "that the division of power between the States and the Federal Government was fixed by the Constitution and could not be changed either by the action of Congress alone or by the conjoint action of Congress and every State in which it was attempted to vest a part of the power delegated to Congress." [32] But after Leisy *v.* Hardin and the *dicta* referring to "congressional permission," Senator George accepted the method suggested by the United States Supreme Court, although he, in common with other senators, believed that the cases making congressional action necessary had been incorrectly decided.

Practically all of the constitutional questions involved—the non-delegability of the commercial power of Congress, the necessity for a uniform rule—were debated in the Senate, and there were exhaustive reviews of the cases which, as I have shown, led up to the *impasse* between the state police power and the

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[31] 51st Congress, 1st Session, Senate Report 993.

[32] *Ibid.*, p. 2.

domain of federal authority. But in the form quoted above the proposed measure was not acceptable.[33]

On May 27, Senator Wilson from the Committee on the Judiciary proposed an amendment providing that when any intoxicating liquors were brought into a state, they shall "when the actual and continuous transportation of the same shall have terminated, be considered to have ceased to be the subjects of commerce with foreign nations and among the several states and be a part of the common mass of property within such state * * * and subject to the respective powers of such state * * * in respect of all police regulations of prohibition regulation, or taxation, equally and in common with all other like property"[34] subject to the police power. This, however, was not satisfactory, and on May 29th the title was changed to read, "A bill to limit the effect of the regulations of commerce between the several states and with foreign countries in certain cases," and the measure itself was amended until it took the form in which it finally became law as the Wilson Act:[35]

> "That all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

In the House of Representatives, the Committee on the Judiciary, to which was referred the Senate measure, reported on July 1st and recommended the passage of a substitute which would have made any article of commerce imported into a state subject to local regulations, provided that there was no discrimination in favor of a state's own citizens or products. The substitute contained this further ambiguous clause, "Nor shall the transportation of commerce through any state be obstructed ex-

[33] CONGRESSIONAL RECORD, 51st Congress, 1st Session, *passim*.
[34] *Ibid.*, p. 5324.
[35] *Ibid.*, p. 5438; 26 Stat. L. 313.

cept in the necessary enforcement of the health laws of such state." The Committee, in its report, instanced the case of illuminating oils, which, unless they were of a certain grade, could not be sold in some of the states. This question has not been tested in the courts, but the committee was of the opinion that:

> "All property which has been imported into a State and kept for sale there ought to be subject, for all purposes, to the jurisdiction of the State, and all persons who would engage in traffic within a State ought to be subject to such rules as it may enact for the regulation of that traffic. There would, however, be no interference with the right of the citizen of a State to procure abroad any article of commerce which he might desire for his own use, and have the same transported and delivered to him at his place of residence. The State would have no power to prevent the importation of any article of commerce nor to obstruct the transportation of commerce through their territories, except in the necessary enforcement of their health laws."

This amendment, the Committee thought, would be a "regulation" of interstate commerce within the constitutional authority of Congress.[36]

It should be pointed out here that the adoption of this substitute as law—although it is open to a good many objections—would have solved some subsequent difficulties arising out of the fact that states which have desired to restrict the sale of certain imported articles other than liquor have encroached upon the federal authority. In the last few Congresses, for example, there has been pending a measure following almost exactly the language of the Wilson Act, designed to enable the states to regulate the sale of goods made by convict labor and sold in competition with goods manufactured by free labor.[37] State laws pro-

[36] 51st Congress, 1st session, House Report 2604. On April 24, 1890, the House Committee on the Alcholic Liquor Traffic recommended the passage of a measure (H. R. 5978) prohibiting the transportation of intoxicating liquors into any state or territory in violation of law. This failed of adoption, but it would seem to have anticipated the Webb-Kenyon Act (March 1, 1913, 37 Stat. L. 699). 51st Congress, 1st Session, House Report 1697.

[37] See "Interstate Commerce in Convict Made Goods," hearing before a subcommittee of the Committee on the Judiciary, U. S. Senate, 61st Congress, 2d session, on H. R. 5601, 63d Congress, 2d session, Senate

hibiting the sale either absolutely or without a mark labelling the goods "convict made" have been declared inoperative as encroaching upon the power to regulate commerce.[38] Problems such as this would have been solved by the adoption of the House substitute.

A minority report, opposing the measure, gives a sketchy review of the experiences with local regulation of commerce under the Articles of Confederation, points out the necessity for uniformity and lack of discrimination and quotes Washington to the effect that, "If the States individually attempt to regulate commerce an abortion or a many headed monster would be the issue. If we consider ourselves, or wish to be considered by others, as a united people why not adopt the measures which are characteristic of it and support the honor and dignity of one." And the substitute proposed to the House would undoubtedly have been a reversion. Better for Congress to relinquish its control or to cut the bonds of its silence in particular cases as the propriety of uniform state regulations becomes apparent, rather than to take away federal protection in all cases. The House of Representatives nevertheless passed this substitute (July 22, 1890),[39] but on August 6, the Committee of Conference recommended the Senate measure, and the conference report was adopted,[40] presidential approval being given the Wilson Act on August 8th.[41]

The debates in Congress, while covering all of the constitutional questions—even those speeches from which I have quoted above—furnish slight basis for decision on the points involved.

Document 446; "Federal and State Laws Relating to Convict Labor," 63d Congress, 2d session, Senate Document 494. H. R. 1933 passed the House on March 4, 1914. In the 64th Congress, 1st session, the measure was H. R. 6871, introduced on January 4, 1916 and favorably reported on January 24th (House Report No. 75).

[38] See the cases referred to by the authorities cited in the preceding footnote. The constitutionality of action by Congress empowering the States to control importations of convict made goods "upon arrival" would seem to be established by the sweeping language of the Supreme Court in the recent Webb-Kenyon cases (James Clark Distilling Co. *v.* Western Md. Railway Co., etc., Nos. 75 and 76, October Term, 1916) decided January 8, 1917.

[39] CONGRESSIONAL RECORD, 51st Congress, 1st session, p. 7563.

[40] *Ibid.*, pp. 8202, 8216. [41] *Ibid.*, p. 8372.

But it is indisputable that the purpose of the legislation was in a sense to recall the two decisions of the United States Supreme Court which had nullified the powers of the states, or, in other words, to enable the local jurisdictions to prevent not only the sale in the original packages but also the importation of intoxicating liquors. As to the constitutional question, the Supreme Court of the United States sustained the constitutionality of the Wilson Act, but its efficacy was soon so seriously impaired that the prohibition forces began to importune Congress first for amendments and then for legislation of a different theory in order to reach the result which they thought they had achieved when the Wilson Act itself had been passed.

III. The Constitutionality of the Wilson Act.

It has been said that the remedy for the non-applicability of state prohibition laws to imported articles was found not in the "confession of error and repentance which everyone would have appreciated," but in a "nostrum" of legal reasoning which served further to becloud the fundamental theories of the Constitution and "started another web of entangling legal and political refinement."[42] The same authority argues that if the logic of Leisy *v.* Hardin prevails the Wilson Act is unconstitutional; but sustained it had to be, since otherwise the Court would have been compelled to face the dilemma of an overruled decision or popular indignation. Now, it will not be questioned, I think, that the Wilson Act was designed to accomplish a result completely consistent with the spirit of the Constitution—that a grant of power to the federal government should not operate to prevent the states from enforcing their local regulations when such enforcement has no effect on proper business undertakings and the purpose of the framers in inserting the commerce clause is not negatived. The Supreme Court might well have said in the first instance, "That the regulations of commerce which were *commercial* in their nature and based on commercial and business reasons were national and required to be uniform;"[43] and thus

[42] A. A. Bruce, "The Wilson Act and the Constitution," 21 Green Bag 211 (1909).

[43] See *Ibid.*, p. 215.

could have been justified local interferences which were in the nature of police regulations.

The problem presented to the Supreme Court by the Wilson Act is then, I think, evident: Congress in effect declared that the States might regulate interstate commerce in certain cases, and the Supreme Court had to cast around to find some method of reasoning which would sustain the statute without acknowledging that legislative power was being delegated, for *delegatus non potest delegare* is a valid maxim of American constitutional jurisprudence,[44] and if the principle was admitted that Congress could relinquish its control over the enumerated subject committed to the federal legislature, the precedent was a dangerous one.

Whether a Kansas law forbidding the sale of intoxicating liquors even in the imported packages was permitted under the Wilson Act was the question presented to the Supreme Court when it was called upon to determine the scope and constitutionality of the federal statute. In both Leisy *v.* Hardin and Bowman *v.* Railroad Co., the opinions had spoken of *congressional permission* that the states might enforce measures like the Kansas law; but such an anomalous theory, entirely novel, I think, in American constitutional law was not adopted as the *ratio decedendi* of In re Rahrer[45] which determined the constitutionality of the Wilson Act. The Court (Mr. Chief Justice Fuller) simply said that, "So long as Congress did not pass any law to regulate it [interstate commerce] specifically, or in such a way as to allow the laws of the State to operate upon it, Congress thereby indicated its will that such commerce should be free and untrammeled." Thus, "it followed as a corollary, that when Congress acted at all, the result of its action must be to operate as a restraint upon that perfect freedom which its silence insured," and in the Wilson Act Congress had spoken.

The Chief Justice recognized that Congress cannot delegate its own power and cannot enlarge the powers of a state. He said:

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[44] 2 WILLOUGHBY, CONST. 1317. In re Rahrer, *infra:* "It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a State." (p. 560).

[45] 140 U. S. 545 (1891).

"The object was undoubtedly sought [by the adoption of the federal Constitution] to be attained of preventing commercial regulations partial in their character or contrary to the common interests. * * * But this consideration furnishes no support to the position that Congress could not, in the exercise of the discretion imposed on it, concluding that the common interests did not require entire freedom in the traffic in ardent spirits, enact the law in question. In so doing, Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt state laws. It has taken its own course and made its own regulation, applying to the subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property.

"* * * The power to regulate [interstate commerce] is solely in the general government, and it is an essential part of that regulation to prescribe the regular means for accomplishing the introduction and incorporation of articles into and with the mass of property in the country or State. * * *

"Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction.

"* * * Jurisdiction attached, not in virtue of the law of Congress, but because the effect of the latter was to place the property where jurisdiction could attach." [46]

These quotations show that the Court discarded any idea of *permission* being granted the states. The Wilson Act was taken as prescribing a rule for intoxicating liquors in interstate commerce—that part of what was interstate commerce should cease to be—and applying to *things,* not to the *states.*[47] Nevertheless, such a narrow doctrine has not been accepted by the courts, and the idea of congressional permission to the states has persisted. Thus, even the United States Supreme Court later said that, "The

[46] Pp. 559, 560, 561, 564, 565.

[47] See J. D. Barnett, "The Delegation of Legislative Power by Congress to the States," 2 AM. POL. SC. REV. 347.

[48] Pabst Brewing Co. *v.* Crenshaw, 198 U. S. 17, 27 (1905).

purpose of the Wilson Act was to confer power on the states," [48] and "to allow the states to exert ampler power" and "enabling" them "to extend their authority." [49] The Supreme Court of Iowa considered the act as having been passed to "give the individual state some effective power of self-defense against the [50] abuse of the privilege of interstate commerce," and in other opinions there are statements "that Congress may, by appropriate legislation, subject any article of interstate commerce to the police regulations of any state," [51] that Congress may "authorize" state legislation which without this authority would be invalid as applied to interstate commerce,[52] and that Congress "consented" to certain state action.[53]

An interesting and valuable note on this subject was inserted by Professor J. B. Thayer in his *Cases on Constitutional Law.*[54] The question, he said, whether a subject admitted of only a uniform system of regulation was primarily a legislative and not a judicial one. "For it involves a consideration of what, on practical grounds, is expedient, possible, or desirable; and whether, being so at one time or place, it is so at another; as in the cases of quarantine and pilotage laws, and laws regulating the bringing in and sale of particular articles, such as intoxicating liquors or opium. * * * It is not in the language itself of the clause of the Constitution now in question, or in any necessary construction of it, that any requirement of uniformity is found, in any case whatever. That can only be declared necessary, in any given case, as being the determination of some one's practical judgment. The question, then, appears to be a legislative one; it is for Congress and not the courts—except indeed in the sense that the courts may control a legislative decision, so far as to keep it within the bounds of reason, of rational opinion."

Therefore, Professor Thayer argued, no judicial determination should stand against a reasonable enactment of Congress

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[48] Delamater *v.* South Dakota, 205 U. S. 93, 97 (1907).
[49] State *v.* Hanaphy, 117 Iowa 15, 90 N. W. 601, 602 (1902).
[50] City of Indianapolis *v.* Bieler, 138 Ind. 30, 36 N. E. 857, 859 (1894).
[51] People *v.* Hesterberg, 184 N. Y. 126, 76 N. E. 1032, 1034 (1906).
[52] In re Bergen, 115 Fed. 339, 342 (1900).
[53] Vol. II., p. 2190.

to the contrary, such as that in the Wilson Law. The fact that the legislature in *any* given case may supersede a judicial determination plainly shows the question to be legislative, not judicial. But Cooley *v.* Port Wardens [55] held that with respect to some phases of interstate commerce—pilotage regulations—the state enactments stand until Congress positively intervenes,[56] and in determining under which head a state law comes in order to ascertain the meaning of the silence of Congress, the courts are passing on a legislative question. The difficulty, therefore, does not seem to be avoided. But Professor Thayer inclined to the opinion that the federal courts would be likely in the future to leave it to Congress to check state legislation,[57] and to limit its own action to cases where the state enactments were so clearly unconstitutional that the consent of Congress could not be valid. He cited the case of Neilson *v.* Garza,[58] in which Mr. Justice Bradley declared that the court would not overthrow an inspection law and that "the duty must stand until Congress shall see fit to alter it."

All this, however, while illuminating on the question of uniformity, does not make convincing the reasoning of In Re Rahrer. Congress had made a regulation, it is true; but it had not said what the state laws should be. "It cannot well be said that it is a regulation by Congress when the states are permitted to regulate. * * * It does not make any difference whether it is called a delegation of power by Congress to the states to prohibit transportation of interstate commerce or a regulation of interstate commerce by Congress. The effect is the same, for it permits the states to regulate interstate commerce. It is not a question of name, but right and power. The equality and freedom sought by the fathers is seriously interfered with." [59]

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[55] 12 How. 299 (1851), *supra*, p. 186.

[56] Pennsylvania *v.* Wheeling etc. Bridge Co., 18 How. 421 (1855).

[57] This does not seem to have been the case with reference to oleomargarine, *supra*.

[58] 2 Woods 287, Fed. Cas. 10,091 (1876).

[59] 29 AM. BAR ASS'N 418, 445 (Address of Judge John J. Jenkins).

"If lack of congressional action shows that the commerce must be free and untrammeled, then the commerce must belong to that class which requires a uniform and general system, and congressional action,

Nevertheless, the Wilson Act and the Kansas laws were declared valid and *apparently* the states had the power to prevent the importation and sale of intoxicating liquors.

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(TO BE CONTINUED.)

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permitting a State to regulate the said interstate commerce, would be unconstitutional; and such an act, if sustained, would be the greatest departure from the construction of the commerce clause that has ever been made. Far better let the court, as I have stated, take judicial cognizance of the evils of unrestrained traffic in liquor, or in opium, and hold the license law a police regulation." R. M. Lisle, "The Original Package Case," 24 AM. LAW REV. 1016, 1026 (1890).